87-435

No.

Supreme Court, U.S.
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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1987

ROBERT M. HAIGHT,
*Petitioner,*

VS.

THE PEOPLE OF THE STATE OF CALIFORNIA,
*Respondent.*

**ON WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CRUZ**

## PETITION FOR WRIT OF CERTIORARI

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BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

## QUESTION PRESENTED

Whether the Fourteenth Amendment to the United States Constitution is violated when the State of California criminally prosecutes and convicts a defendant for restraining bidding at a non-judicial foreclosure sale under a statute which fails to give fair notice that the defendant's conduct was proscribed.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert M. Haight, respectfully prays that a writ of certiorari issue to review the opinion of the Appellate Department of the Superior Court of the State of California, which held, in a case of first impression, that California's statutory prohibition against restraining bidding at non-judicial foreclosure sales is not unconstitutionally vague as applied to Petitioner's activities.

## OPINIONS BELOW

The opinion of which review is sought in this Court is the opinion of the Superior Court of the State of California for the County of Santa Cruz, Appellate Division, in *People of the State*

*of California v. Robert M. Haight,* Appellate Number 422. The opinion is unpublished; it was rendered on August 20, 1986.

## GROUNDS FOR JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 United States Code Section 1257(3) on the ground that his rights under the Fourteenth Amendment to the United States Constitution were violated.

The Superior Court of the State of California for the County of Santa Cruz, Appellate Department, rejected Petitioner's Fourteenth Amendment claim by its opinion dated August 20, 1986; on September 12, 1986, that court denied Petitioner's Request for Rehearing and certified the matter for transfer to the Court of Appeal of California, Sixth Appellate District. The Court of Appeal denied the transfer on October 7, 1986.

The California Supreme Court denied Petitioner's Petition for Writ of Habeas Corpus by its order filed July 16, 1987. The instant Petition for Writ of Certiorari is filed within sixty (60) days of that order.

## CONSTITUTIONAL PROVISIONS AND STATUTES

The following provisions of the United States Constitution and Statutes of the State of California are involved in this Petition:

## UNITED STATES CONSTITUTION

## AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay and debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. [U.S. Con. Amd. XIV]

## CALIFORNIA CIVIL CODE SECTION 2924g

(a) All sales of property under the power of sale contained in any deed of trust or mortgage shall be held in the county where the property or some part thereof is situated, and shall be made at auction, to the highest bidder, between the hours of 9 a.m. and 5 p.m. on any business day, Monday through Friday.

The sale shall commence at the time and location specified in the notice of sale. Any postponement shall be announced at the time and location specified in the notice of sale for commencement of the sale or pursuant to paragraph (1) of subdivision (c) herein.

If the sale of more than one parcel of real property has been scheduled for the same time and location by the same trustee, (1) any postponement of any of the sales shall be announced at the time published in the notice of sale; (2) the first sale shall commence at the time published in the notice of sale or immediately after the announcement of any postponement; and (3) each subsequent sale shall take place as soon as possible after the preceeding sale has been completed.

(b) When the property consists of several known lots or parcels they shall be sold separately unless the deed of trust or mortgage provides otherwise; or when a portion of the property is claimed by a third person, and he requires it to be sold separately, such portion may be thus sold. The trustor, if present at the sale, may also, unless the deed of trust or mortgage otherwise provides, direct the order in which property shall be sold, when such property consists such several known lots or parcels which may be sold to advantage separately, and the trustee shall follow that direction. After sufficient property has been sold to satisfy the indebtedness no more can be sold.

If the property under power of sale is in two or more counties the public auction sale of all of the property under the power of sale may take place in any one of the counties where the property or a portion thereof is located.

(c)(1) There may be postponement of the sale proceedings at any time prior to the completion of the sale thereof at the

discretion of the trustee, upon instruction by the beneficiary to the trustee that the sale proceedings be postponed, or upon the written request of the trustor, provided that reason for the request is to permit the trustor to obtain cash sufficient to satisfy the obligation or bid at the sale and the written request identifies the source from which the funds are being obtained. The trustor shall be entitled to make one such request for postponement and any postponement made at the request of the trustor shall be for a period not to exceed one business day.

There may be a maximum of three postponements of the sale proceedings pursuant to this subdivision. In the event that the sale proceedings are postponed three times, the scheduling of any further sale proceedings shall be preceded by the giving of a new notice of sale in the manner prescribed by Section 2924f. A postponement made upon the request of the trustor shall not be deemed a postponement for purposes of this paragraph.

(2) The trustee shall postpone the sale upon the order of any court of competent jurisdiction; or by operation of law; or by the mutual agreement, whether oral or in writing, of any trustor and any beneficiary or any mortgagor and any mortgagee. Any postponement pursuant to this paragraph shall not be a postponement for purposes of determining the maximum number of postponements permitted pursuant to this subdivision.

(d) The notice of each postponement and the reason therefor shall be given by public declaration by the trustee at the time and place last appointed for sale. Such public declaration of postponement shall also set forth the new date, time, and place of sale, which place of sale shall be the same place as originally fixed by the trustee for the sale. No other notice of postponement need be given. The trustee shall maintain records of each postponement and the reason therefor. [California Civil Code Section 2924g].

## CALIFORNIA CIVIL CODE SECTION 2924h(f)

(f) It shall be unlawful for any person, acting alone or in concert with others, to offer to or accept from another any consideration of any type not to bid or to fix or restrain bidding in any manner at a sale of property conducted pursuant to a power of

sale in a deed of trust or mortgage. In addition to any other remedies, any person committing any act declared unlawful by this subdivision or any at which would operate as a fraud or deceit upon any beneficiary, trustor, or junior lienor shall, upon conviction be fined not more that $10,000 or imprisoned in the county jail for not more than one year, or be punished by both such fine and imprisonment. [California Civil Code 2924h(f), applicable to Appellant.]

California Civil Code Section 2924h(f) was modified after the trial and appeal in this matter to read as follows:

> (f) It shall be unlawful for any person, acting alone or in concert with others, *(1)* to offer to or accept from another any consideration of any type not to bid, or *(2)* to fix or restrain bidding in any manner, at a sale of property conducted pursuant to a power of sale in a deed of trust or mortgage. In addition to any other remedies, any person committing any act declared unlawful by this subdivision or any act which would operate as a fraud or deceit upon any beneficiary, trustor, or junior lienor shall, upon conviction, be fined not more that ten thousand dollars ($10,000) or imprisoned in the county jail for not more than one year, or be punished by both *that* fine and imprisonment. [California Civil Code Section 2924h(f). [Emphasis added to 1986 changes].

## STATEMENT OF THE CASE

On May 28, 1985, after a jury trial of nine (9) days in the Municipal Court of California for the County of Santa Cruz, Petitioner was convicted of one misdemeanor count of violating California Civil Code § 2924h(f).

Petitioner was convicted of Count 1 of the criminal complaint, for "restraining" the bidding at a non-judicial real property foreclosure sale. Petitioner was an attorney acting on behalf of beneficiaries of the second deed of trust which was in default. The "restraint" of bidding for which Petitioner was punished consisted of his instructions to the trustee to postpone the sale if any potential bidders appeared to bid on the property.

Count 2 of the criminal complaint charged Petitioner with accepting consideration for postponing the sale. He was acquitted of this charge. Count 3, which charged him with committing fraud or deceit upon a junior lienor was dismissed when the jury was unable to reach a verdict.

Throughout the proceedings, Petitioner has argued that the statute under which he was charged requires that consideration be sought or offered for fixing or restraining the foreclosure sale, or, if the offer or acceptance of such consideration was not required, that the statute was unconstitutionally vague on its face. Petitioner's federal constitutional claims were clearly raised at all stages of the criminal proceedings against him.

First, Petitioner demurred to the criminal charges against him. One basis of Petitioner's demurrer was that the statute was ambiguous on its face, and thus violative of the Fourteenth Amendment to the United States Constitution. This claim was raised for the court by Petitioner's counsel, ROBERT E. BOSSO, at page 4 of his Reply to Response to Demurrer as follows: "Finally, when subjecting a citizen to criminal liability, the legislature must write a statute that is clear on its face. *Brown v. United States*, 623 F.2d 54 (1980)." Petitioner's demurrer was overruled by the Municipal Court after a hearing on April 4, 1985.

After evidence in the matter was taken, Petitioner renewed his claims of unconstitutionality by a Motion for Judgment and, thereafter, by his Motion in Arrest of Judgment.

Subsequently, the federal constitutional question of vagueness was again raised by Petitioner in his briefs on appeal to the Appellate Division of the Superior Court. The constitutional claim appears in Petitioner's Opening Brief at page 11, line 16 to page 12, line 18, as follows:

> If a Professor of Law, specializing in real property and introduced by the prosecution cannot tell whether a particular act violates the section as interpreted by the trial court, the Court must hold that under the Fourteenth Amendment of the United States Constitution that the section is so vague and ambiguous as to be unconstitutionally void.

The Fourteenth Amendment's due process clause protects all of us from poorly drafted criminal statutes. Criminal statutes must give clear notice to citizens that specific conduct will be henceforth subject to criminal prosecution.

As the leading case of *Connally v. General Const. Co.* (1926) 269 U.S. 385, 46 S.Ct. 126, 127 quoted by 1 Witkin, *California Crimes* § 19 (1963) states:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

See also, *United States v. Cardiff* (1952) 344 U.S. 174, 73 S.Ct. 189, 190: "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included *or what acts are prohibited.*" [Emphasis added.] *Palmer v. Euclid* (1971) 402 U.S. 544, 91 S.Ct. 1563, 1564 [Statute must give person of ordinary intelligence fair notice that his contemplated conduct was forbidden].

The statute in question clearly fails to meet those standards, and is, therefore, void. It does not give fair notice that mere restraint, for whatever reason, may be a crime, it does not define restraint, and it has no provision limiting its scope.

Petitioner's claim that the statute is unconstitutional is reiterated in Petitioner's Closing Brief at page 7, lines 8 to 9, as follows in pertinent part: " . . . It is this very uncertainty that makes this statute void for vagueness . . . " The claim was repeated at oral argument before the Appellate Division, and again at page 3, line 3, to page 4, line 17, of the Petition for Rehearing and Application for Certification submitted by Petitioner on September 3, 1986:

> Finally, this Court has relied almost exclusively upon *Bowland v. Municipal Court*, 18 C3d 749 (1976) in determining that the statute was not unconstitutionally vague. *Bowland*, however, is clearly distinguishable because, in that case, no contention was made that the defendant midwife had not engaged in proscribed conduct; rather, the defendant therein argued that other innocent conduct might also (and unconstitutionally) be punished under the challenged statute. In this case, however, the very conduct prosecuted is arguably not a violation of the statute in question. The defendant herein engaged in conduct which he believed innocent and which the statute does not clearly make a violation. Nevertheless, it was precisely that conduct which was punished under the statute. For that reason, the *Bowland* case is not applicable and should not have been relied on in deciding this issue of constitutional import.

Finally, Petitioner once again set forth his constitutional claim before the State of California in his Petition for Writ of Habeas Corpus at page 10, line 21, to page 11, line 2, as follows:

> . . . As *Connally, supra*, points out a new penal statute must be sufficiently explicit to inform those citizens who are subject to it as to what conduct on their part will render them liable for its penalties. The statute in question clearly fails to do so and is therefore void under the Fourteenth Amendment of the United States Constitution as a denial of due process. It does not give fair notice that mere postponement, which is clearly authorized by Civil Code Section 2924g, may be a crime, it does not define restraint, and it has no provision for limiting its scope.

The Petition for Writ of Habeas Corpus was denied by the California Supreme Court on July 16, 1987.

Petitioner now seeks redress of his constitutional violations before this Court.

## REASONS FOR GRANTING THE WRIT

It is a fundamental precept of our constitutional system of law that no citizen shall be criminally punished for conduct which is not clearly proscribed by the State. That precept has been grossly violated in this case.

An unconstitutionally vague statute is particularly worrisome when it purports to regulate conduct which is as widespread and as common as conducting non-judicial foreclosure sales. It is undisputed that in California over ninety percent (90%) of all foreclosures are of the "non-judicial" variety. When, as here, a State chooses to impose criminal sanctions as a method of regulating private commercial conduct, it is imperative that the statute give fair notice to all of what conduct will invoke criminal penalties. The statute in question did not provide fair notice. In fact, the preceeding section, California Civil Code Section 2924g, seems to permit a beneficiary to postpone a sale for any reason. The statutory changes which the legislature enacted in 1986 resolve the ambiguity which is patent in the previous statute; the very fact of the 1986 legislative amendments demonstrates the statute's vagueness and unfairness. If the statute had been clear, as the trial and appellate court contended, there would have been no need for such change.

In a period of ever expanding governmental regulation of private commercial activity, it is of nationwide importance that this Court secure the rights of individuals against criminal prosecution for alleged violation of clearly ambiguous statutes.

Dated: September 14, 1987

Respectfully Submitted,

By DENNIS J. KEHOE

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Superior Court of the State of California
for the County of Santa Cruz

Appellate Division

People of the State of California
Respondent-Plaintiff,

vs.

Robert M. Haight,
Appellant-Defendant.

APP No. 422

OPINION

This is an appeal from conviction for violation of Civil Code Section 2924h(f), restraining bidding at a non-judicial foreclosure sale, a misdemeanor. The statute provides:

> (f) It shall be unlawful for any person, acting alone or in concert with others, to offer to or accept from another any consideration of any type not to bid or to fix or restrain bidding in any manner at a sale of property conducted pursuant to a power of sale in a deed of trust or mortgage. . .

Appellant was also charged in a second count with offering or receiving consideration not to bid at a sale, and in a third count with committing an act which operated to defraud a junior lienholder. He was acquitted on the second count and the third count was dismissed when the jury was unable to reach a verdict. A co-defendant, Warren Penniman, Jr., similarly accused was acquitted on all charges.

The facts relate to a parcel of improved real property owned by Phillip Halcomb (25%), Katherine Kalisch (25%), Island Realty (18.375%), Juanella Funkey (18.375%) and Penniman Title Company (13.25%). Juanella Funkey is appellant's wife. Warren Penniman, Jr. is manager of Penniman Title. The property had a value of between $275,000 and $300,000 and was encumbered by a first deed of trust of approximately $150,000 and a second deed of trust of $30,000. Additionally, the property was subject to several junior liens in excess of $300,000 related to obligations of and judgments against Phillip Halcomb.

The first and second deeds of trust were in default in June of 1984. The owners, other than Funkey and Penniman Title, were unwilling to contribute to clear the defaults. The beneficiary of the second deed of trust initiated foreclosure proceedings with Penniman Title as trustee. At that point appellant's wife, using her maiden name, J. Garret, and Warren Penniman, Jr. (hereinafter "Penniman"), purchased the second deed of trust for the value of the note plus accruals of approximately $40,000. Appellant's wife acquired a two-thirds interest and Penniman a one-third interest. Instead of curing the default, they took an assignment of the Note. They were now lenders to themselves and the foreclosure continued.

Appellant, an attorney with extensive experience in real estate matters, began acting on behalf of his wife and as attorney for Penniman Title. Appellant and Penniman decided to notice the trustee's sale in The Good Times, a paper of general circulation, but not normally used for notices of sale by Penniman Title or any title company. Only one other such notice had ever been published in The Good Times. At trial, appellant and Penniman testified that they published in The Good Times because they hoped no one would see the notice.

The sale was noticed for October 18, 1984. Had no qualified bidders appeared and the sale occurred, appellant's wife and Penniman would have received the property for a credit bid of the value of their note. At least three qualified bidders, aside from appellant and Penniman, appeared at the sale. The sale was postponed at appellant's request. Following the postponement, several bidders went back to Penniman's office. Appellant advised one bidder that as long as someone showed up at the sale it would be postponed. The foreclosure officer advised another bidder that the beneficiaries wanted the property for themselves and, if anybody showed up for the sale, they would postpone it.

The following written instructions were given to Penniman Title by appellant:

> You are instructed to postpone for four days additional if there are any bidders at the sale now scheduled for October 25, 1984 at 10:00 a.m. If postponed on 10/25/84 to

> 10/29/84 and there any bidders on 10/29/84, you are to postpone for one additional week and, if there are any bidders at that time, you are to cancel the sale but not the default.

At trial appellant testified that he knew propsecitve bidders would tire sooner or later and not show up.

On October 25, 1984, the date of the second sale, bidders did show up, and the sale was postponed to October 29, 1984. On that date when bidders arrived, the sale was postponed to November 5, 1984, and on that date when bidders arrived, the sale was cancelled.

Thereafter, the sale was readvertised in another newspaper, the Santa Cruz Sentinel. The sale was scheduled for December 11, 1984. On December 5, 1984, appellant instructed Penniman Title in writing as follows:

> The Trustee's Sale scheduled for December 11, 1984, at 10:00 a.m., is to be postponed one week to December 18, 1984, at 10:00 a.m., in the event there are any qualified bidders that show up for the sale on the 11th.

When qualified bidders showed up on December 11, 1984, Penniman cancelled further foreclosure proceedings rather than postpone them.

Appellant raises three primary contentions on appeal:

1. In order to violate Civil Code Section 2924h(f), one must receive or accept or offer to receive or accept consideration.

2. If Civil Code Section 2924h(f) does not require the element of consideration, it is so ambiguous as to be unconstitutionally void for vagueness.

3. The court erroneously gave and refused instructions.

## STATUTORY INTERPRETATION

The trial court determined that there was a violation of Civil Code Section 2924h(f) if any person restrained bidding at a non-

judicial foreclosure sale and "to offer to or accept consideration" was not a necessary element. Again, the statute provides:

> (f) It shall be unlawful for any person, acting alone or in concert with others, to offer to or accept from another any consideration of any type not to bid *or* to fix or restrain bidding *in any manner* at a sale of property conducted pursuant to a power of sale in a deed of trust or mortgage . . . (emphasis added)

Rules of statutory construction support the conclusion reached by the trial court. Every word or phrase is intended to have meaning and perform a useful function. *Mandavi v. Fair Employment Practices Commission*, 67 Cal. App. 3d 326, 334 (1977). The words "in any manner" would be useless if the words concerning consideration applied to "restrain bidding". Civil Code Section 2924h(f) is a remedial statute and should be construed to accomplish the Legislature's purpose. If the statute is read to require the element of consideration, the obvious general purpose of preventing the manipulation of open bidding at foreclosure sales would be defeated.

The record on appeal includes evidence concerning the legislative history of the statute. The declaration of Deputy Attorney General Ron Reiter, who drafted Section 2924h(f) and who testified before legislative committees, was relied upon by the trial judge. Reiter has clearly stated that the intent of the Legislature was to include any fixing or restraining of bidding, regardless of the offer or acceptance of consideration, as a violation. The documents submitted by appellant are less persuasive. They include documents prepared by staff of legislative committees considering the statute. The reports summarily state that consideration is an element of the statute but there is no discussion of the purpose behind the wording, and there is no indication of whether the writers reflected on the statute's purpose or merely interpreted the wording of the bill.

## CONSTITUTIONALITY

Appellant contends that if consideration is not a necessary element, the statute is vague and prohibits conduct which may be

innocent. He claims the word "restrain" is undefined and Civil Code Section 2924g allows for continuances which obviously restrain bidding.

Section 2924h(f), which makes it unlawful "to fix or restrain bidding in any manner", is part of a statutory scheme. Section 2924g provides for postponements under limited circumstances. It does not allow unlimited continuances and cancellation to avoid competitive bidding.

As the California Supreme Court has stated: "It is well established that a specific provision should be construed with reference to the entire statutory system of which it is a part in such a way that the various elements of the overall scheme are harmonized." *Bowland v. Municipal Court*, 18 Cal. 3d 479, 489 (1976). In *Bowland*, a lay midwife was prosecuted under Business and Professions Code Section 2141. That section provided:

> Any person, who practices or attempts to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury or other mental or physical condition of any person, without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, or without being authorized to perform such act pursuant to a certificate obtained in accordance with some other provision of law, is guilty of a misdemeanor.

The argument that the code section forbade various forms of possible innocent conduct was rejected as a reason for finding the section void. The court stated:

> In examining statutes challenged on vagueness grounds, courts have looked not merely at the hypothetical cases to which the statute has uncertain applicability, but also at the act allegedly committed by the charged defendant. (9) The presumptive validity of a legislative act militates against invalidating a statute merely ". . . because difficulty is found in determining whether certain marginal offenses fall within . . . [its] language. [¶] Void for vagueness simply means that

criminal responsibility should not attach where one could not reasonably understand that *his* contemplated conduct is proscribed." (*United States v. National Dairy Corp.* (1963) 372 U.S. 29, 32 [9 L.Ed.2d 561, 565, 83 S.Ct. 594], citations omitted, italics added; see also *Parker v. Levy* (1974) 417 U.S. 733, 756-757 [41 L.Ed.2d 439, 457-458, 94 S.Ct. 2547].) (10) We are not obliged to "... consider every conceivable situation which might arise under the language of the statute... (*In re Cregler* (1961) 56 Cal.2d 308, 313 [14 Cal. Rptr. 289, 363 P.2d 305]), so long as that language may be given "... a reasonable and practical construction in accordance with the probable intent of the Legislature" and encompassing the conduct of the defendants (*County of Nevada v. MacMillen* (1974) 11 Cal.3d 662, 673 [114 Cal Rptr. 345, 522 P.2d 1345]). Thus plaintiffs cannot complain of the vagueness of a statute if the conduct with which they are charged falls clearly within its bounds. In the matter before us we conclude that it does. (492)

When the evidence at trial is considered with a view most favorable to the People, appellant was engaged in the manipulation of a non-judicial foreclosure sale for his benefit and to the detriment of qualified bidders and subordinate lienholders. Civil Code Section 2924h(f) is not vague when applied to appellant's activities.

## JURY INSTRUCTIONS

Appellant claims error in the giving and refusing of certain instructions. The instructions given over appellant's objection were consistent with the trial court's determination that Civil Code Section 2924h(f) prohibits the restraint of bidding without the element of any offer or acceptance of consideration not to bid. Each of the instructions properly allowed the jury to take into consideration appellant's ultimate purpose when the note was purchased and the sales were advertised, postponed and cancelled.

It was proper for the trial court to refuse the instructions offered by appellant. They were inaccurate (No. 6), irrelevant (No. 4) and unnecessary (No. 3).

The judgment is affirmed.

DATED: August 20, 1986

COTTLE, J.
Cottle, J.

WE CONCUR:

MAY, J.
May, J.

BLACK, J.
Black, J.

Superior Court of California,
County of Santa Cruz

Appellate Division

Case Number
App. No. 422

People of the State of California,
Respondent-Plaintiff(s)

vs

Robert M. Haight,
Appellant-Defendant(s)

Certificate of Mailing

I, RICHARD W. BEDAL, County Clerk and Clerk of the Superior Court of the State of California for the County of Santa Cruz, and not a party to the within action, hereby certify that on August 21, 1986, I served copies of the attached OPINION by depositing the enclosed in sealed envelopes with the postage thereon fully prepaid, in the United States Post Office at Santa Cruz, California, addressed as follows:

DON GARTNER
Asst. District Attorney
County of Santa Cruz
Santa Cruz, CA 95060

ROBERT BOSSO
Attorney at Law
323 Church Street
Santa Cruz, CA 95060

Courtesy Copy:

Austin Comstock
Attorney at Law
340 Soquel Avenue
Santa Cruz, CA 95060

Dated: 8-21-86

Richard W. Bedal, County Clerk and Clerk of the Superior Court, Santa Cruz, State of California, County of Santa Cruz

By _____
Deputy Clerk

Clk 461 Rev 2/86

Superior Court of the State of California
for the County of Santa Cruz

Appellate Division

APP. No. 422

Order Denying Petition for Rehearing and
for Certification to Court of Appeal

People of the State of California,
*Respondent-Plaintiff,*

vs.

Robert M. Haight,
*Appellant-Defendant.*

The above-entitled Court having reviewed the petition for rehearing and application for certification to the Court of Appeal and good cause appearing therefore,

IT IS HEREBY ORDERED ADJUDGED AND DECREED:

1. The petition for rehearing is denied.

2. There appears to be a need to secure uniformity in decision and to settle important quesitons of law as for as involves this case. This case is hereby certified to the Court of Appeal, Sixth Appelate District, on the following grounds:

A. In order to violate Civil Code Section 2924(f) is it necessary for one to receive or accept or offer to receive or accept consideration? This Court determined, in upholding the trial court, that if a person is restrained from bidding at a non-judicial foreclosure sale it was not necessary to offer to or accept consideration as an element of the crime. Appellant contends that consideration is absolutely essential in order to constitute a violation of the aforementioned Civil Code Section.

B. Appellant contends that even if Civil Code Section 2924(f) does not require the element of consideration, it is so ambiguous as to be unconstitutionally void for vagueness.

C. The Appellant contends that there were errors in the jury instructions. However, the errors were consistent with the trial court's determination that Civil Code Section 2924(f) was not only constitutional but did not require a consideration in order to constitute a violation thereof.

This case meets the criteria for certification to the Court of Appeal pursuant to California Rules of Court 62 and 63(a) and especially in view of the fact of the significant constitutional issues presented; the fact that this is the first criminal prosecution under Statute; and the widespread use of non-judicial foreclosure sales requires a reliable and identifiable standard for conduct and involves a significant unsettled issue of law.

The decision of this Court, showing the nature of its holdings and the date of its filings is attached hereto as Exhibit "A".

DATED: 9-12, 1986.

BLACK, P.J.
Black, P.J.

Superior Court of the State of California
for the County of Santa Cruz

Appellate Division
App. No. 422
OPINION

People of the State of California,
Respondent-Plaintiff,

vs.

Robert M. Haight,
Appellant-Defendant.

This is an appeal from conviction for violation of Civil Code Section 2924h(f), restraining bidding at a non-judicial foreclosure sale, a misdemeanor. The statute provides:

> (f) It shall be unlawful for any person, acting alone or in concert with others, to offer to or accept from another any consideration of any type not to bid or to fix or restrain bidding in any manner at a sale of property conducted pursuant to a power of sale in a deed of trust or mortgage. . .

Appellant was also charged in a second count with offering or receiving consideration not to bid at a sale, and in a third count with committing an act which operated to defraud a junior lienholder. He was acquitted on the second count and the third count was dismissed when the jury was unable to reach a verdict. A co-defendant, Warren Penniman, Jr., similarly accused was acquitted on all charges.

The facts relate to a parcel of improved real property owned by Phillip Halcomb (25%), Katherine Kalisch (25%), Island Realty (18.375%), Juanella Funkey (18.375%) and Penniman Title Company (13.25%). Juanella Funkey is appellant's wife. Warren Penniman, Jr. is manager of Penniman Title. The property had a value of between $275,000 and $300,000 and was encumbered by a first deed of trust of approximately $150,000 and a second deed of trust of $30,000. Additionally, the property was subject to several junior liens in excess of $300,000 related to obligations of and judgments against Phillip Halcomb.

The first and second deeds of trust were in default in June of 1984. The owners, other than Funkey and Penniman Title, were unwilling to contribute to clear the defaults. The beneficiary of the second deed of trust initiated foreclosure proceedings with Penniman Title as trustee. At that point appellant's wife, using her maiden name, J. Garret, and Warren Penniman, Jr. (hereinafter "Penniman"), purchased the second deed of trust for the value of the note plus accruals of approximately $40,000. Appellant's wife acquired a two-thirds interest and Penniman a one-third interest. Instead of curing the default, they took an assignment of the note. They were now lenders to themselves and the foreclosure continued.

Appellant, an attorney with extensive experience in real estate matters, began acting on behalf of his wife and as attorney for Penniman Title. Appellant and Penniman decided to notice the trustee's sale in The Good Times, a paper of general circulation, but not normally used for notices of sale by Penniman Title or any title company. Only one other such notice had ever been published in The Good Times. At trial, appellant and Penniman testified that they published in The Good Times because they hoped no one would see the notice.

The sale was noticed for October 18, 1984. Had no qualified bidders appeared and the sale occurred, appellant's wife and Penniman would have received the property for a credit bid of the value of their note. At least three qualified bidders, aside from appellant and Penniman, appeared at the sale. The sale was postponed at appellant's request. Following the postponement, several bidders went back to Penniman's office. Appellant advised one bidder that as long as someone showed up at the sale it would be postponed. The foreclosure officer advised another bidder that the beneficiaries wanted the property for themselves and, if anybody showed up for the sale, they would postpone it.

The following written instructions were given to Penniman Title by appellant:

> You are instructed to postpone for four days additional if there are any bidders at the sale now scheduled for October 25, 1984 at 10:00 a.m. If postponed on 10/25/84 to

> 10/29/84 and there are bidders on 10/29/84, you are to postpone for one additional week and, if there are bidders at that time, you are to cancel the sale but not the default.

At trial appellant testified that he knew prospective bidders would tire sooner or later and not show up.

On October 25, 1984, the date of the second sale, bidders did show up, and the sale was postponed to October 29, 1984. On that date when bidders arrived, the sale was postponed to November 5, 1984, and on that date when bidders arrived, the sale was cancelled.

Thereafter, the sale was readvertised in another newspaper, the Santa Cruz Sentinel. The sale was scheduled for December 11, 1984. On December 5, 1984, appellant instructed Penniman Title in writing as follows:

> The Trustee's Sale scheduled for December 11, 1984, at 10:00 a.m., is to be postponed one week to December 18, 1984, at 10:00 a.m., in the event there are any qualified bidders that show up for the sale on the 11th.

When qualified bidders showed up on December 11, 1984, Penniman cancelled further foreclosure proceedings rather than postpone them.

Appellant raises three primary contentions on appeal:

1. In order to violate Civil Code Section 2924h(f), one must receive or accept or offer to receive or accept consideration.

2. If Civil Code Section 2924h(f) does not require the element of consideration, it is so ambiguous as to be unconstitutionally void for vagueness.

3. The court erroneously gave and refused instructions.

## STATUTORY INTERPRETATION

The trial court determined that there was a violation of Civil Code Section 2924h(f) if any person restrained bidding at a non-judicial foreclosure sale and "to offer to or accept consideration" was not a necessary element. Again, the statute provides:

> (f) It shall be unlawful for any person, acting alone or in concert with others, to offer to or accept from another any consideration of any type not to bid *or* to fix or restrain bidding *in any manner* at a sale of property conducted pursuant to a power of sale in a deed of trust or mortgage . . . (emphasis added)

Rules of statutory construction support the conclusion reached by the trial court. Every word or phrase is intended to have meaning and perform a useful function. *Mandavi v. Fair Employment Practices Commission*, 67 Cal. App. 3d 326, 334 (1977). The words "in any manner" would be useless if the words concerning consideration applied to "restrain bidding". Civil Code Section 2924h(f) is a remedial statute and should be construed to accomplish the Legislature's purpose. If the statute is read to require the element of consideration, the obvious general purpose of preventing the manipulation of open bidding at foreclosure sales would be defeated.

The record on appeal includes evidence concerning the legislative history of the statute. The declaration of Deputy Attorney General Ron Reiter, who drafted Section 2924h(f) and who testified before legislative committees, was relied upon by the trial judge. Reiter has clearly stated that the intent of the Legislature was to include any fixing or restraining of bidding, regardless of the offer or acceptance of consideration, as a violation. The documents submitted by appellant are less persuasive. They include documents prepared by staff of legislative committees considering the statute. The reports summarily state that consideration is an element of the statute but there is no discussion of the purpose behind the wording, and there is no indication of whether the writers reflected on the statute's purpose or merely interpreted the wording of the bill.

## CONSTITUTIONALITY

Appellant contends that if consideration is not a necessary element, the statute is vague and prohibits conduct which may be innocent. He claims the word "restrain" is undefined and Civil

Code Section 2924g allows for continuances which obviously restrain bidding.

Section 2924h(f), which makes it unlawful "to fix or restrain bidding in any manner", is part of a statutory scheme. Section 2924g provides for postponements under limited circumstances. It does not allow unlimited continuances and cancellation to avoid competitive bidding.

As the California Supreme Court has stated: "It is well established that a specific provision should be construed with reference to the entire statutory system of which it is a part in such a way that the various elements of the overall scheme are harmonized." *Bowland v. Municipal Court*, 18 Cal. 3d 479, 489 (1976). In *Bowland*, a lay midwife was prosecuted under Business and Professions Code Section 2141. That section provided:

> Any person, who practices or attempts to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury or other mental or physical condition of any person, without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, or without being authorized to perform such act pursuant to a certificate obtained in accordance with some other provision of law, is guilty of a misdemeanor.

The argument that the code section forbade various forms of possible innocent conduct was rejected as a reason for finding the section void. The court stated:

> In examining statutes challenged on vagueness grounds, courts have looked not merely at the hypothetical cases to which the statute has uncertain applicability, but also at the act allegedly committed by the charged defendant. (9) The presumptive validity of a legislative act militates against invalidating a statute merely ". . . because difficulty is found in determining whether certain marginal offenses fall within . . . [its] language. [¶] Void for vagueness simply means that criminal responsibility should not attach where one could not

reasonably understand that *his* contemplated conduct is proscribed." (*United States v. National Dairy Corp.* (1963) 372 U.S. 29, 32 [9 L.Ed.2d 561, 565, 83 S.Ct. 594], citations omitted, italics added; see also *Parker v. Levy* (1974) 417 U.S. 733, 756-757 [41 L.Ed.2d 439, 457-458, 94 S.Ct. 2547].) (10) We are not obliged to "... consider every conceivable situation which might arise under the language of the statute..." (*In re Cregler* (1961) 56 Cal.2d 308, 313 [14 Cal. Rptr. 289, 363 P.2d 305]), so long as that language may be given "... a reasonable and practical construction in accordance with the probable intent of the Legislature" and encompassing the conduct of the defendants (*County of Nevada v. MacMillen* (1974) 11 Cal.3d 662, 673 [114 Cal. Rptr. 345, 522 P.2d 1345]). Thus plaintiffs cannot complain of the vagueness of a statute if the conduct with which they are charged falls clearly within its bounds. In the matter before us we conclude that it does. (492)

When the evidence at trial is considered with a view most favorable to the People, appellant was engaged in the manipulation of a non-judicial foreclosure sale for his benefit and to the detriment of qualified bidders and subordinate lienholders. Civil Code Section 2924h(f) is not vague when applied to appellant's activities.

## JURY INSTRUCTIONS

Appellant claims error in the giving and refusing of certain instructions. The instructions given over appellant's objection were consistent with the trial court's determination that Civil Code Section 2924h(f) prohibits the restraint of bidding without the element of any offer or acceptance of consideration not to bid. Each of the instructions properly allowed the jury to take into consideration appellant's ultimate purpose when the note was purchased and the sales were advertised, postponed and cancelled.

It was proper for the trial court to refuse the instructions offered by appellant. They were inaccurate (No. 6), irrelevant (No. 4) and unnecessary (No. 3).

The judgment is affirmed.

DATED: August 20, 1986

J. COTTLE
Cottle, J.

WE CONCUR:

J. MAY
May, J.

J. BLACK
Black, J.

Superior Court of California,
County of Santa Cruz

Case Number
App. No. 422

People of the State of California,
Plaintiff(s)

vs

Robert M. Haight,
Defendant(s)

Certificate of Mailing

I, RICHARD W. BEDAL, County Clerk and Clerk of the Superior Court of the State of California for the County of Santa Cruz, and not a party to the within action, hereby certify that on September 12, 1986, I served copies of the attached Order Denying Petition for Rehearing and for Certification to Court of Appeal by depositing the enclosed in sealed envelopes with the postage thereon fully prepaid, in the United States Post Office at Santa Cruz, California, addressed as follows:

DON GARTNER, Esq.
County of Santa Cruz
Santa Cruz, CA 95060

ROBERT BOSSO, Esq.
323 Church Street
Santa Cruz, CA 95060

Courtesy Copy:

Austin Comstock, Esq.
340 Soquel Avenue
Santa Cruz, CA 95060

Dated:

Richard W. Bedal, County Clerk and Clerk of the Superior Court, State of California, County of Santa Cruz

By _____
Deputy Clerk

CLK 461 Rev 2/86

Court of Appeal

of the

State of California

in and for the

Sixth Appellate District

No. 6-8

Superior Court No. 422

People Of The State Of California,
Plaintiff and Respondent,

vs.

Robert M. Haight,
Defendant and Appellant.

BY THE COURT

Upon consideration of the Appellate Department's certification for transfer of the appeal in this case to this court, transfer is denied.

Dated _____

_____ P.J.

Order Denying Writ of Habeas Corpus

Criminal No. 26001

In the Supreme Court of the State of California

In Bank

In re HAIGHT (ROBERT MILES) on Habeas Corpus.

Petition for writ of habeas corpus DENIED.

LUCAS
*Chief Justice*